BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARROLL KEAR Claimant	)	
VS.	)	Docket No. 1,021,878
SEDGWICK COUNTY CONTROLLER Self-Insured Respondent	)	

ORDER

Claimant requests review of the July 27, 2005 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The claimant had back surgery for a condition that was not related to her work for respondent. She was released to return to work with respondent and she alleges she then suffered work-related aggravations of her preexisting back condition.

The Administrative Law Judge (ALJ) found the claimant's current problems are due to her failed back surgery in October 2003 rather than later aggravations of that condition while working for the respondent. Therefore, the ALJ denied benefits to the claimant.

The claimant requests review of whether she suffered an injury or aggravation of a preexisting condition arising out of and in the course of employment with respondent. Claimant argues she aggravated her preexisting back condition as a result of several accidents that occurred at work for respondent.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant testified she had injured her back while working for a previous employer. She testified that she fell on ice but never filed a workers compensation claim. In July 2003, she began working for the respondent as an office specialist.

As a result of her preexisting low back condition the claimant had back surgery on October 30, 2003. She indicated that the surgery only provided relief for about six hours. Claimant was initially provided a back brace but because she felt it aggravated her back symptoms, she was then provided a "clam shell" thoracolumbosacral orthosis (TLSO) which she continued to wear when released to return to work. Because of continued pain complaints additional surgery was recommended by her neurosurgeon. A second neurosurgeon agreed with that recommendation. Instead, claimant opted for chronic pain management treatment.

She was initially returned to part-time work for respondent. Because claimant wore the TLSO respondent ordered a special chair that would accommodate the claimant's brace. Claimant was eventually released to work full time and alleged she suffered several incidents at work that hurt her back. Her supervisor, Sandra Sinclair, acknowledged that claimant described some incidents but denied that one occurred and further noted that claimant never indicated that she needed to file a claim as a result of the incidents.

It further appears that a dispute developed between claimant and her supervisor and claimant felt a hostile work environment had developed which apparently culminated in claimant being transferred to a different job in January 2005.

But claimant testified that she was physically able to perform her work and did not feel that she had suffered any work-related injury before she transferred jobs.[1] Beginning in January 2005, claimant sent a number of e-mails initially complaining that the new job would violate her restrictions. After the transfer, claimant's work station in outpatient services was designed for three people and she was the fourth person to work in the same area. She alleged she was constantly being bumped by co-worker's chairs. She further alleged her work activities which included bending to retrieve files out of the bottom file drawer as well as phone books from the floor, violated her restrictions.

Claimant's co-workers admitted that the close quarters did result in the employees occasionally bumping into each other. But they disputed that the contact was as severe as claimant alleged and they further noted that they would perform the bending to retrieve items for the claimant. It was also noted that claimant's complaints were puzzling as she was observed bending and hugging a friend but otherwise complained of pain whenever touched. Claimant was further noted leaning back in a chair and laughing during a telephone conversation in a nurse's office until she was later aware she was being observed and then her demeanor and pain complaints returned. Lastly, it was noted that claimant only worked between 10-15 days from the time she transferred on January 10, 2005, through her last day worked on March 3, 2005, and that from the first day she continually complained of back pain attributable to her prior surgery.

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[1] P.H. Trans. at 31.

On March 16, 2005, the claimant saw Dr. Paul Stein for an evaluation and diagnosis. Dr. Stein diagnosed claimant with failed laminectomy and fusion. The doctor questioned whether there was a solid fusion but was hesitant to recommend further invasive procedures because claimant demonstrated multiple Waddell signs of non-organic back pain. He concluded claimant had considerable psychogenic functional overlay and recommended a psychological evaluation.

On April 25, 2005, claimant was seen and evaluated by Dr. George Fluter at her attorney's request. Dr. Fluter concluded claimant suffered chronic low back pain as a result of failed lumbar surgery. Dr. Fluter opined that claimant's work aggravated her preexisting condition. But his report does not detail which work activities caused the aggravation.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[4]

The claimant testified that she aggravated a preexisting back condition at work for respondent when she was transferred to a different job in January 2005. Dr. Fluter offered the opinion that claimant's work had aggravated her preexisting low back condition. Conversely, claimant's co-workers offered a different picture of the nature of claimant's work after January 2005 which rebutted claimant's contentions regarding being constantly bumped and whether she was required to bend to retrieve items on the floor as well as the bottom of file cabinets. Moreover, there was testimony that placed in question the severity of pain claimant was suffering.

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed respondent's witnesses over

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[2] K.S.A. 44-501(a).

[3] K.S.A. 44-508(g).

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

the claimant's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the claimant's credibility by personally observing her testify.

The ALJ made the following pertinent findings:

> 6. This Court listened to the Claimant testify on May 31, 2005, and has reviewed a transcript of that testimony. The Court has read the testimony of seven of the Claimant's co-workers.
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> 7. This Court finds that it is more probable than not that the Claimant's present problems are related to her failed back surgery in October of 2003, and were not aggravated by anything that happened while working for the Respondent for 10-15 days between January 10, 2005, and March 3, 2005. All benefits are denied.[5]

Initially, it should be noted claimant testified that she did not suffer a work-related injury until after she was transferred to a different job on January 10, 2005. And it should be noted that she began complaining about the new job before she had even transferred and started training. It is significant that claimant was in a dispute regarding a hostile work environment which apparently has lead to a separate civil action. Claimant's e-mails demonstrate that she did not want to transfer to the new job and after the transfer did not work very many days at that job. Her complaints about the physical activities at that job were rebutted by the testimony of her co-workers. Finally, her pain complaints were not only found suspect by her co-workers but also by Dr. Stein. This Board member concludes that claimant failed to meet her burden of proof that she suffered any accidental injury arising out of her employment activities from January 10, 2005, through March 3, 2005.

In addition, the question of whether any alleged worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity for respondent aggravated, accelerated or intensified the underlying disease or affliction.[6]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[7], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from

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[5] ALJ Order (July 27, 2005) at 2.

[6] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

> the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[8], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[9], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[10], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's back condition simply did not resolve after her surgery. Her neurosurgeon as well as another doctor both recommended additional surgery before she attempted to return to her work with respondent.[11] Claimant opted for chronic pain

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[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[9] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[11] P.H. Trans., Cl. Ex. 1 at 2.

management treatment. Although claimant was eventually released to regular duties by her treating physician, claimant continued to experience back pain with activity.

In this instance, based upon the record compiled to date, the Board finds that claimant's condition did not arise out of her employment with respondent and is a natural consequence of the preexisting original injury and back surgery. Accordingly, the Board affirms the ALJ's Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[12]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated July 27, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2005.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Robert G. Martin, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[12] K.S.A. 44-534a(a)(2).